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IN THE

Supreme Court of the United States

October Term, 1941

No. 543-545

ANDREW GRANT ILSENG, JR., ANDREW G. ILSENG and LESLIE A. McKERCHER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND SUPPORTING BRIEF.

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SUBJECT INDEX.

PAGE

Petition for Writ of Certiorari 1

Opinions of the court below 2

Statement of the case 2

Basis of jurisdiction 7

The questions presented 7

Reasons for granting the writ 9

As to question I 9

As to question II 10

As to question III 11

Certificate of verification 12

Brief in Support of Petition 13

Jurisdiction 13

Opinion of court below 13

Statement 14

Specifications of error 14

Argument 16

I.

The holding by the Circuit Court of Appeals that sufficient foundation was laid for the introduction in evidence of the books and records and for the expert testimony based thereon seems clearly erroneous, as does also the holding by the Circuit Court of Appeals that the District Court was correct in overruling the petitioners' objection to the use of the entries in the books themselves to determine whether or not the books had been kept in the regular and due course of business 16

PAGE

II.

The holding of the Circuit Court of Appeals seems erroneous in declaring (a) even where a foundation for the introduction in evidence of books and records is not sufficient except under the more liberal rule laid down in 28 U. S. C. A., Section 695, entries which were made in such books earlier than the effective date of that statute are, nevertheless admissible; (b) that that statute is remedial only and does not affect any substantive right of one accused of crime; and (c) that of the two conflicting opinions in Valli v. United States, 94 Fed. (2d) 687, and Landay v. United States, 108 Fed. (2d) 698, the latter is the better reasoned and should be followed.... 19

Conclusion..... 22

TABLE OF AUTHORITIES CITED.

CASES.

PAGE

Greenbaum et al. v. United States (C. C. A. 9), 98 Fed. (2d) 574 ..... 20, 21

Johnson v. United States (6 Cir.), 89 Fed. (2d) 913 21

Landay v. United States (C. C. A. 6), 108 Fed. (2d) 698 ..... 15, 21

Valli v. United States (C. C. A. 1), 94 Fed. (2d) 687 (cert. granted 3-28-38, 58 Sup. Ct. 760) 11, 15, 20, 21

STATUTES.

Act of February 13, 1925 (43 Stat. 938) 7

Judicial Code, Sec. 240(a) 7, 13

18 United States Codes Annotated, Sec. 88 2

18 United States Codes Annotated, Sec. 338 2

28 United States Codes Annotated, Sec. 695 ..... 5, 7, 8, 10, 11, 15, 19, 20, 21

28 United States Codes Annotated, Sec. 695h 5, 7, 8, 10

28 United States Code Annotated, Sec. 695 to 695h 8

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To the Honorable, the Supreme Court of the United States:

The petitioners, Andrew Grant Ilseng, Jr. (hereinafter referred to as "Ilseng, Jr."), Andrew G. Ilseng (hereinafter referred to as "Ilseng, Sr.") and Leslie A. McKercher, pray that a writ of certiorari be issued by this court to review a judgment of the Circuit Court of

Appeals for the Ninth Circuit, entered June 13, 1941 [R. 840-853], reversing the judgment of the United States District Court for the Southern District of California, Central Division, pronounced on count one, affirming the judgment of the District Court pronounced upon the other counts, under which the petitioners had been found guilty, and remanding the case to the District Court for re-sentence of the petitioners and for disposition of the two other counts upon which the record was silent. In this behalf, petitioners show:

Opinions of the Court Below.

The District Court wrote no opinion. The opinion of the Circuit Court of Appeals [R. 840 to 853] has not yet been reported. No opinion was written by the Circuit Court of Appeals in denying the petition for rehearing.

Statement of the Case.

Petitioners were found guilty by the District Court, sitting without a jury, under an indictment in twenty counts, the first nineteen charging substantive offenses of "mail fraud" (18 U. S. C. A., Sec. 338) and the twentieth charging a conspiracy to commit an offense against the laws of the United States (18 U. S. C. A., Sec. 88). Ilseng, Jr., was sentenced to imprisonment for one year on count one and to a concurrent sentence of one year on each other count on which he was convicted of a mail fraud violation. As to him, sentence was sus-

pended on the conspiracy charge and he was placed on probation for three years. Each of the other petitioners was sentenced to three years' imprisonment on count one and to a similar concurrent term on each of the other counts on which he was convicted of a mail fraud violation and to a term of two years' imprisonment on the conspiracy count, such latter term to begin at the expiration of the term imposed under count one [R. 106, 108, 111].

The judgment of the Circuit Court of Appeals reversed all of the convictions under count one and set aside all sentences pronounced on the petitioners and remanded the cause to the District Court for resentence of the petitioners.

1. Ilseng, Sr., was in active control of various mining operations [Op. of C. C. A., R. 841] and voluminous books and records of those companies were introduced in evidence against all of the petitioners upon no other foundation than that: (a) they were at the date of trial (January, 1939) in the same condition (except for one minor change) as they were in May, 1937, when a post office inspector examined them [Op. of C. C. A., R. 844]; (b) they were the books used by the companies when a certain accountant was employed on April 2, 1934, which accountant had made some entries in some of those books, but not in all of them, between April 2, 1934, and August 23, 1936, when he left the companies' employ [Op. of C. C. A., R. 844]; (c) that they were the "books that were made available to me (another accountant) for

audit purposes" by Ilseng, Sr., in May, 1937, "and which I (he) used" [Op. of C. C. A., R. 845].

Yet the Circuit Court of Appeals said:

> "* * * We hold that the books and records were properly admitted into evidence and were clearly applicable to the case of Ilseng, Sr. * * *" [Op. of C. C. A., R. 848].

2. There was not the slightest evidence that Ilseng, Jr., or McKercher ever had anything to do with the keeping of the books, nor is there the slightest bit of evidence to show that they knew or had any idea of what the books contained. Neither the prosecution nor the District Court, nor the Circuit Court of Appeals, makes any such claim.

The Circuit Court of Appeals held:

> "Since the (District) Court found them (petitioners Ilseng, Jr., and McKercher) to be co-conspirators, the receipt of these proffered exhibits was correct as to them only if the evidence sustains such finding. We shall proceed to discuss this question." [Op. of C. C. A., R. 848.]

The discussion that follows clearly shows the Circuit Court of Appeals *used the evidence taken from those books and records themselves to establish that there was a conspiracy* of which McKercher and Ilseng, Jr., were a part. The Circuit Court then holds:

> "* * * we cannot find that the case is without substantial evidence to support the court's finding of guilt as to the conspiracy count of the indictment.

* * * This being so, of course the books and records were properly admitted against McKercher." [Op. of C. C. A., R. 851-852.]

"In the circumstances, the books and records were properly received (as against Ilseng, Jr.)." (Op. of C. C. A., R. 852.]

3. The prosecution offered the testimony of experts, based on the books, to show the falsity of financial statements used by the corporations and to prove that the dividends paid on the stock were illegal and improper, as charged in the indictment. No other evidence than that based on the books and records was offered to substantiate those charges.

The entries concerning which these experts testified were made during and covered a period from the fiscal year ending April 30, 1933 [R. 454], to September 30, 1937 [R. 463].

Nevertheless, the action of the District Court in admitting in evidence the books and records without the foundation usually required is approved by the Circuit Court when it says:

"The federal statute relating to the admission of books and records into evidence reads (28 U. S. C. A., Secs. 695 and 695h):

'In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of

any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation, and calling of every kind.' * * *

'Sections 695 to 695h of this title shall be propective only and not retroactive.' "

* * * * * * * * *

"The indictment here was returned long after the statute became effective. It is true that some of the dates in the records introduced in the instant case predate the statute and Valli v. United States [C. C. A. 1], 94 Fed. (2d) 687, holds them to be inadmissible. The date of the indictment does not appear in the report of the cited case. The later, and in our opinion the better reasoned, case of Landay v. United States, 108 Fed. (2d) 698, holds that the statute changes the rule of evidence . . ." [Op. of C. C. A., R. 847.]

and holds admissible such records which predate the statute.

Basis of Jurisdiction.

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938.

The opinion of the Circuit Court of Appeals for the Ninth Circuit was filed June 13, 1941 [R. 853]; petition for rehearing was filed July 12, 1941 [R. 857]; and such petition for rehearing was denied July 23, 1941 [R. 857]. Application for stay of mandate pending application in this court for writ of certiorari was made and order staying the mandate to and including August 25, 1941, pending the application for writ of certiorari in this court was entered July 23, 1941 [R. 858].

The Questions Presented.

The decision on the three questions here presented depends to a large extent upon the consideration of Sections 695 and 695h of 28 U. S. C. A., copies of which sections are set out in paragraph 3, *supra*. In the interest of brevity, they are not here again copied. The questions are:

> I. Was sufficient or any foundation laid (and it will be admitted that the only foundation laid was that set out in paragraph 1, *supra*) for the introduction in evidence of the books and records and for the expert testimony based thereon, either under the provisions of Section 695 of 28 U. S. C. A., or under any other law, either as against (a) Ilseng, Sr., or (b) as against Ilseng, Jr., and McKercher?

Is the Circuit Court of Appeals correct in stating, with respect to the petitioners' objection, that "there was no foundation laid for the introduction of the books and records as they had not been shown to have been kept in the regular course of business; and that *the books themselves could not be used to determine whether or not they had been kept in the regular, due course of business*"

"The (District) Court overruled all of these objections and we think correctly"? [Op. of C. C. A., R. 846.] (Emphasis supplied.)

II. Under the provisions of Section 695 of 28 U. S. C. A., or under any law, was the Circuit Court of Appeals correct in holding the books and records and testimony of experts based thereon, are admissible against Ilseng, Jr. and McKercher on the ground that Ilseng, Jr. and McKercher were co-conspirators with Ilseng, Sr.?

III. Inasmuch as Section 695h of 28 U. S. C. A. specifically declares that Sections 695 to 695h of that title "shall be prospective only and not retroactive", is the Circuit Court of Appeals correct in holding that where books are introduced upon a foundation no broader than that required by Section 695 of 28 U. S. C. A., entries which predate the statute are also admissible; and in holding Section 695 is remedial only; and in holding that although there is an admitted conflict on this point between the Circuit Court of Appeals of the First and Sixth Circuits, the judgment of the latter should be followed, because it is "the better reasoned" of the two? [Op. of C. C. A., R. 847.]

Reasons for Granting the Writ As to Question I.

The question is new, highly important, and one of general law and has been decided by the Circuit Court of Appeals in a way that is probably untenable; the decision is also on an important question of federal law, which has not been but should be settled by this court, and in deciding the question the Circuit Court has sanctioned such a far departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

The holdings of the Circuit Court of Appeals set forth under the caption "The Questions Presented," paragraph I (which, in the interest of brevity, are not repeated here) are apparently in conflict with the weight of authority and the applicable decisions of this court and of other Circuit Courts of Appeals in holding: (1) That sufficient foundation had been laid for the introduction of the books and of the expert testimony based thereon as against (a) Ilseng, Sr., and (b) Ilseng, Jr., and McKercher; and (2) that the books, themselves, could be used to determine whether or not they had been kept in the regular, due course of business.

As to Question II.

This is an important question of general law, decided by the Circuit Court of Appeals in a way probably untenable and in conflict with the weight of authority; it is a question of general importance, involving the construction and application of a statute of the United States which has not been, and should be, settled by this court, and in so deciding the Circuit Court has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court as to call for an exercise of this court's power of supervision.

The holdings of the Circuit Court of Appeals, set forth under the caption "The Questions Presented," paragraph II (which, in the interest of brevity, are not repeated here), present questions involving the construction and application of statutes of the United States (28 U. S. C. A., Sections 695 and 695h) and the answers to which questions have never been, but should be, settled by this court, in that they directly affect the rights of a defendant charged with a criminal offense, and particularly with a violation of the conspiracy statute of the United States, to be confronted with the witnesses against him. The holdings of the Circuit Court of Appeals has so far departed from the usual and accepted course of judicial proceedings and has sanctioned such a far departure by the District Court from the usual and accepted course of judicial proceedings in such matters as to call for an exercise of this court's power of supervision.

As to Question III.

The Circuit Court of Appeals has decided an important question of general law in a way probably untenable and in conflict with the decision of another Circuit Court of Appeals (the First Circuit Court of Appeals) on the same matter; and has decided a question of general importance, involving the construction and application of a statute of the United States, which has not been, but should be, settled by this court, and in so deciding the Circuit Court has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the District Court as to call for an exercise of this court's power of supervision.

The holdings of the Circuit Court of Appeals, set forth under the caption "The Questions Presented," paragraph III (which, in the interest of brevity, are not repeated here), are, by this Circuit Court's own admission, in conflict with the decision on the same point by the Circuit Court of Appeals for the First Circuit, as pronounced in *Valli v. United States* [C. C. A. 1], 94 Fed. (2d) 687 (cert. gtd. 3/28/38, 58 Sup. Ct. 760), and such holding by this Circuit Court of Appeals is probably in conflict with other applicable decisions of other circuits and of this court in holding that Section 695 of Title 18, U. S. C. A., is remedial only and removes the necessity of laying a foundation for documentary evidence with the same exactness as was required before the taking of effect of said Section 695 and in holding that when the require-

ments of Section 695 have been met entries in such documents that predate the statute are also admissible.

Petitioners respectfully represent that, accompanying this petition, and as an exhibit thereto, is a certified copy of the transcript of the entire record in this case, including the proceedings in the Circuit Court of Appeals for the Ninth Circuit.

Wherefore, it is respectfully submitted that this petition should be granted.

DAVID H. CANNON,
Attorney for petitioners.

Certificate of Verification.

State of California, County of Los Angeles—ss.

David H. Cannon, being first duly sworn, deposes and says: That he is counsel for Andrew Grant Ilseng, Jr., Andrew G. Ilseng and Leslie A. McKercher, petitioners in the within and foregoing action; that he prepared the within petition and that the matters therein are true as he verily believes, and that the same is not interposed for the purpose of delay.

DAVID H. CANNON.

Subscribed and sworn to before me this 19th day of August, 1941.

REED E. CALLISTER,
Notary Public in and for Said County and State.